Office Supreme Court, U. S.
FILED
APR 14 1902
JAMES H. McKENNEY,
Clerk

No. 37.

Brf. of Hamlin & Deneen for D.

No. ~~506~~. 37

Filed April 14, 1902.

IN THE Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

EDWARD S. DREYER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

BRIEF AND ARGUMENT IN BEHALF OF DEFENDANTS IN ERROR.

H. J. HAMLIN,
Attorney General,
CHARLES S. DENEEN,
State's Attorney of Cook Co.
ATTORNEYS FOR DEFENDANTS IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

EDWARD S. DREYER,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

On February 4, 1899, an indictment was returned to the Criminal Court of Cook County, State of Illinois, against the plaintiff in error, for failure to turn over on demand to his successor in office funds which came into his hands as treasurer of the West Chicago Park Commissioners, amounting to $316,000. The indictment was based upon section 215 of the Criminal Code of the State of Illinois, quoted on pages 1 and 2 of plaintiff in error's brief. At a trial had under such indictment in August and September, 1899, the jury disagreed, whereupon the Court entered the following order:

"* * * The jury aforesaid having now returned into Court *and being unable to agree* upon a verdict are thereupon discharged from the further consideration of this case." (Rec., 14.)

At a second trial, had in February and March, 1900, the defendant was found guilty, and, after the overruling of motions for new trial and in arrest of judgment, was sentenced in conformity with the law of the State of Illinois, approved April 21, 1899, and in force July 1, 1899, entitled "An Act to revise the law in relation to the sentence and committment of persons convicted of crime, and providing for a system of parole, * * *" the first six sections of which are set forth in plaintiff in error's brief on pages 78 to 83.

As stated in the opinion of the Court below:

"It was not denied on the trial that $316,013.40 of the Park Commissioners' funds came into the hands of the defendant, as its treasurer, which he failed to pay over to his successor on demand, and the only defense attempted to be interposed was, that his failure to pay it over was the result of unavoidable loss or accident."

As the assignments of error are not predicated upon any facts involving the merits of the offense charged in the indictment, or whether such failure was the result of unavoidable loss or accident, it is necessary to recite only such facts from the record as pertain to such assignments of error.

The matters relied upon as errors are, (1) that at the second trial the bailiffs in charge of the jury were not sworn in accordance with the statutes of the State of Illinois; (2) that the discharge of the jury in the first trial was arbitrarily made without the consent of the defendant and that therefore the trial operated to place him once in jeopardy, and (3) that the "indeterminate sen-

tence law" of the State of Illinois under which judgment was entered and sentence imposed upon the plaintiff in error, is unconstitutional.

As to the first point, the following are the only facts of record:

That on February 20th, 1900, eight jurors were selected and sworn and the following order entered:

"And it is further ordered by the Court that during each adjournment of this Court during the trial of this cause the jurors remain in charge of *sworn* officers of this Court to be by them kept together and returned into Court at the hour ordered pursuant to adjournment." (Rec., 15 and 16.)

That on February 21st, 1900, the other four jurors were selected and sworn and the taking of testimony begun (Rec., 16); that the hearing continued until February 28th, when it was entered of record that,

"The aforesaid jury, hearing the further arguments of counsel and the instructions of the Court, retired in charge of *sworn* officers to consider of their verdict." (Rec., 19.)

That on March 1st, the following order was entered:

"And also come the jurors of the jury aforesaid in charge of *sworn* officers of this court; and the aforesaid jury, for verdict say, 'We, the jury, find the defendant, Edward S. Dreyer, guilty, etc." (Rec., 19.)

In addition to the foregoing matters of record, it appeared by the bill of exceptions that upon motion for a new trial certain affidavits were presented to the effect that the bailiffs were not sworn after February 20th, nor in the language of the statute. Counter affidavits also were filed. One of the affidavits filed in support of the said motion was by one of the trial attorneys for plaintiff in error, which stated, in effect, that having in mind the

requirements of the statute, he was specially watching to note whether it was complied with (Rec., 32). But no objection was made to the retirement of the jury with the officers as sworn, no ruling was called for upon that matter by the vigilant attorneys, and the omission to swear the bailiffs in due form and time, if it occurred, does not appear as a matter of fact in the record, not even by any recital of the court in the bill of exceptions. In a separate opinion of affirmance, Mr. Justice Cartwright and Chief Justice Boggs held that the record did not present the question raised in this assignment of error. (*Dreyer* v. *People*, 188 Ill., 60-64.)

As to the question of "once in jeopardy," the following are the only facts in the record relating thereto:

That at the close of the previous trial of the plaintiff in error under the same indictment, had from August 29th to September 2d, the following order of discharge was entered:

"And also come the jurors of the jury aforesaid, being now returned into court *and being unable to agree* upon a verdict, are thereupon by order of this court discharged from further consideration of this cause." (Rec., 14.)

And the fact that the jury were out about seventeen hours, also appears.

An effort was made by counsel in the trial court to amend this record by striking out the words "*being unable to agree,*" but the Court denied the motion. (Rec., 18.)

A plea of once in jeopardy was filed, alleging that the jury retired to consider their verdict at 4:55 p. m., September 1st, 1899, and were discharged the next morning at 9:30 a. m. It further alleges pretended knowledge of the number of ballots taken and the standing of the jury

upon each, and sets forth the claim that plaintiff in error through his attorney objected to the discharge of said jury. But none of these matters were admitted in evidence, except the fact as to the time the jury retired and were discharged, and it was nowhere preserved in a bill of exceptions what transpired at the time of the discharge of the jury, or whether any protest or objection thereto was made by plaintiff in error, or any exception taken by him to the order of the court discharging the jury.

So far, therefore, as the record shows, the only basis of fact upon which the claim of once in jeopardy can rest is the order of the court finding that the jury was unable to agree and the fact that the jury were out about seventeen hours.

There is nothing in the record to sustain the contention that the jury were discharged without the consent of plaintiff in error. There was a mere offer to prove it. (Rec., 261, 279.) The court below in the main opinion did not consider whether this question was properly raised, but said:

"Conceding that the question was regularly raised on the trial, it was properly overruled. The plea was based upon the theory that by the discharge of the jury upon the first trial without the consent of the defendant, he was entitled to be then acquitted and could not be legally put upon trial a second time. As shown above, the jury were discharged for the reason *that it was unable to agree.*"

These, together with the judgment and sentence of the court, being the only essential matters of record which will receive the consideration of this court upon the assignments of error, we pass to a discussion of the questions of law raised by them.

BRIEF.

I.

As to the Record and Party's Own Acts.

1. *Where the officer who takes charge of the jury on retiring to consider their verdict is not sworn, objection and exception should be taken and preserved by bill of exceptions.*

U. S. v. *Ball*, 163 U. S., 662, 674.
McKinney v. *People*, 2 Gilm., 540, 554.
Pate v. *People*, 2 Gilm., 644, 662.
Holmes v. *People*, 5 Gilm., 478.
McIntyre v. *People*, 38 Ill., 514, 518.
Knouff v. *People*, 6 Ill. App., 154.
Atterberry v. *State*, 56 Ark., 515.
State v. *Frier*, 118 Mo., 648, 651.

The courts of Illinois have never reversed on such ground except where it positively appeared of record that the officers were not sworn.

McIntyre v. *People*, *supra*.
Lewis v. *People*, 44 Ill., 462.
Gibbons v. *People*, 23 Ill., 466.
Jackson v. *People*, 36 Ill. App., 88.

In all other cases the judgment has been affirmed.

McKinney v. *People*, *supra*.
Pate v. *People*, *supra*.
Holmes v. *People*, *supra*.
Knouff v. *People*, *supra*.
Sanders v. *People*, *supra*.
Morton v. *People*, 47 Ill., 476.
Dreyer v. *People*, 188 Ill., 40.

2. *The law presumes till the contrary appears that the court performed its duty, and where the record is silent it will be presumed that the jury retired in charge of sworn officers.*

McKinney v. *People, supra.*
Pate v. *People, supra.*
Holmes v. *People, supra.*
Knouff v. *People, supra.*
Morton v. *People, supra.*
Sanders v. *People, supra.*
State v. *Pitts*, 11 Iowa, 343.
State v. *Ryan*, 13 Minn., 370.
Clark v. *State*, 55 Tenn. (8 Bax.), 591.
People v. *Waters*, 1 Idaho, 560.
Bennett v. *Comm.* 8 Leigh, 745.

A recital in record that the officers placed in charge of jury were sworn sufficiently shows that they were duly sworn.

Holmes v. *People*, 5 Gilm., 478.
State v. *Nelson*, 132 Mo., 184.
Moore v. *State*, 96 Tenn., 209.
Lancaster v. *State*, 91 Tenn., 267.

3. *Courts are not disposed to reverse upon a mere claim of such irregularity, especially in absence of any showing of injurious results therefrom.*

Sanders v. *People*, 124 Ill., 218.
Wilhelm v. *People*, 72 Ill., 468.
Adams v. *People*, 47 Ill., 381.
Hittner v. *State*, 19 Ind., 48.
State v. *Crofton*, 89 Iowa, 109, 120.
State v. *Hayes*, 78 Mo., 307, 314.

State v. *Hays*, 78 Mo., 600, 608.
State v. *Frier*, 118 Mo., 648, 651.
People v. *Johnson*, 46 Hun., 667, 673.
State v. *Poindexter*, 23 W. Va., 805, 813.
Jarnagin v. *State*, 18 Tenn. (10 Yerg.), 529.
Stone v. *State*, 23 Tenn. (4 Humph.), 27.
United States v. *Ball*, 163 U. S., 662.

4. *The record imports verity, and its conclusiveness cannot be impeached by affidavits.*

Dreyer v. *People*, 188 Ill., 60-64.
Eastman v. *People*, 93 Ill., 112.
Henning v. *State*, 106 Ind., 386, 390.
Polin v. *State*, 14 Neb., 540, 549.
State v. *Frier*, 118 Mo., 650.
Van Houston v. *People*, 22 Colo., 53, 57.

The record could have been changed only by amendment, and if the court during the term had been satisfied of its incorrectness from the affidavits it could, even on its own suggestion, have amended it.

Weed v. *Weed*, 25 Conn., 337.
Kelty v. *High*, 29 W. Va., 381.

5. *The accused has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error, on account of such irregularities. If he neglects in proper time to insist on his rights, he waives them.*

McKinney v. *People*, *supra*.
Chase v. *People*, 40 Ill., 352.
Dyer v. *People*, 84 Ill., 624.
Eastman v. *People*, 93 Ill., 113.

Kelly v. *People*, 132 Ill., 371.
Atterberry v. *State*, 56 Ark., 515.
Henning v. *State*, 106 Ind., 386, 392.
Waterman v. *State*, 116 Ind., 51.
Polin v. *State*, 14 Neb., 540, 549.
Hunter v. *State*, 43 Ga., 483.
Thompson & Merriman, Juries, Sec. 399, note.

The principle that an accused may waive a right extends to the highest rights, even to those secured by the constitution.

(a) *Waiver of right to be confronted by witnesses.*
Reynolds v. *U. S.*, 98 U. S., 145.
Williams v. *State*, 61 Wis., 281.
Rosenbaum v. *State*, 33 Ala., 354.
U. S. v. *Sacramento*, 2 Mont., 239.
Shular v. *State*, 105 Ind., 298.

(b) *Of right to be present at trial.*
Sahlinger v. *People*, 132 Ill., 241.
State v. *Kelly*, 97 N. C., 404.
Fight v. *State*, 7 Ohio, 327.
State v. *Wamire*, 6 Ind., 357.
Barton v. *State*, 67 Ga., 653.
Price v. *State*, 36 Miss., 533.

(c) *Of separation of jurors in capital cases.*
Henning v. *State*, *supra*.
Polin v. *State*, *supra*.
U. S. v. *Gilbert*, 2 Sumner, 17.

(d) *Of copy of indictment and lists required by statute.*
Kelly v. *People*, 132 Ill., 371.

II.

The Question of Jeopardy.

The prevailing rule is that the discharge of a jury without the consent of the defendant, because, after mature deliberation, they are unable to agree upon a verdict, is not an acquittal, and does not entitle the defendant to immunity from further prosecution. Whether they can agree is a question for the sound discretion of the court.

U. S. v. *Perez*, 9 Wheaton, 579.
Barrett v. *State*, 35 Ala., 406.
Ex Parte v. *McLaughlin*, 41 Cal., 212.
State v. *Woodruff*, 2 Day (Conn.), 504.
State v. *Updike*, 4 Harr. (Del.), 581.
Lester v. *State*, 33 Ga., 329.
Williford v. *State*, 23 Ga., 1.
Logg v. *People*, 8 Ill. App., 106.
Dreyer v. *People*, 188 Ill., 47-49.
State v. *Nelson*, 26 Ind., 366.
State v. *Walker*, 26 Ind., 346.
Shaffer v. *State*, 27 Ind., 131.
State v. *Wilson*, 50 Ind., 487.
Hoffman v. *State*, 20 Md., 425.
Comm. v. *Purchase*, 2 Pick. (19 Mass.), 521.
Comm. v. *Bowden*, 9 Pick. (Mass.), 494.
People v. *Schoeneth*, 44 Mich., 498.
People v. *Harding*, 53 Mich., 487.
Price v. *State*, 36 Miss., 533.
Whitten v. *State*, 61 Miss., 723.
People v. *Greene*, 13 Wend. (N. Y.), 57.
Goodwin v. *People*, 18 Johns. Cases (N. Y.), 200.

State v. *Jefferson*, 66 N. C., 309.
Dobbins v. *State*, 14 Ohio St., 493.
State v. *Nelson* (R. I.), 35 L. R. A., 560.
State v. *McKee*, 1 Bailey (S. C.), 651.
Smith v. *State*, 22 Tex. App., 197.
Moseley v. *State*, 33 Tex., 671.
Proffatt on Jury Trials, Secs. 484, 485.
1 Bish. Crim. Law (6th Ed.), Sec. 1033.
Archbold Crim. Pr. & Pl., Vol. I, p. 593.
Graham & Waterman on New Trials, Vol II, p. 118.
Am. & Eng. Ency. Law (Jeopardy), Vol. XI, p. 953.

III.

Constitutionality of Indeterminate Sentence Law.

The indeterminate sentence acts, in providing for an indefinite period of imprisonment between the minimum and maximum term prescribed by statute, subject to powers of parole and discharge by the pardoning power, do not confer judicial power upon the pardon boards or boards of control, and infringe no constitutional rights of the prisoner.

George v. *People*, 167 Ill., 447.
People ex rel Bradley, v. *Ill. State Reformatory*, 148 Ill., 413.
Conlon's Case, 148 Mass., 168.
Com. v. *Brown*, 167 Mass., 144, 146.
Oliver v. *Oliver*, 168 Mass., 592.
Com. v. *Crowley*, 128 Mass., 121.
Murphy v. *Com.* (Mass), 43 L. R. A., 154.
Miller v. *State* (Ind.), 40 L. R. A., 109.
State v. *Peters*, 43 Ohio St., 629.

ARGUMENT.

For convenience we shall take up the alleged errors in which they are presented in plaintiff in error's brief.

I.

THE CONTENTION THAT THE JURY WERE NOT IN CHARGE OF SWORN OFFICERS, AS REQUIRED BY STATUTE, IS, ON THE RECORD AND STATE OF FACTS IN THIS CASE, UNTENABLE.

This contention, being predicated upon affidavits filed in support of a motion for a new trial (the statements in which are denied in counter affidavits), and in face of a **record which states that the jury were in charge of sworn officers, and which discloses no exceptions taken,** either to the oath administered or to the jury retiring in charge of such officers, raises the following questions:

(1) Can plaintiff in error be heard to complain of an alleged error to which he made no objection and with respect to which he has preserved no exception, and from which no injury is claimed?

(2) Will not the presumption arise from a recital in the record that the jury were in charge of *sworn* officers, that they were *properly* sworn and that the court did its duty?

(3) Can the record which discloses that the jury were in charge of sworn officers be impeached by affidavits to the contrary after verdict rendered?

(4) Can the accused stand by in silence while irregu-

lar proceedings take place, and then ask for a writ of error to reverse them? Does he not waive such irregularities?

1.

Where the officer who takes charge of the jury on their retiring to consider their verdict is not sworn, objection and exception should be taken, and preserved by the bill of exceptions.

The record discloses that the jury "**retired in charge of officers to consider their verdict.**" (Rec., 19.) And again: "**Now comes the jury in charge of sworn officers of this court, and for their verdict say,**" etc. (Rec., 19.) The record does not disclose any objection by defendant below to the jury retiring in charge of such officers, nor to the oath which was administered to such officers. No ruling of the court was invoked thereon, and no exception to such proceedings was preserved. The only way that the fact thus evinced by the record is questioned, is by affidavits presented in support of a motion for a new trial.

We do not question the ruling laid down in the cases of *McIntyre* v. *People*, 38 Ill., 520, and *Lewis* v. *People*, 44 Ill., 462, to the effect that the requirement of section 435 (Hurd's R. S. Ill.) of the Criminal Code is a peremptory one and should be complied with, and that when it positively *appears of record*, as it did in both of those cases, that the jury did *not* retire in charge of sworn officers, such failure to comply with the law is reversible error.

But where the record does *not* disclose that the jury

retired in charge of officers *not* sworn, then the only way in which such error can be availed of is by objection and exception duly preserved by a bill of exceptions. The Illinois Supreme Court very early in its history committed itself upon this proposition and has never since departed from its ruling.

In *McKinney* v. *People*, 2 Gilm., 540, the plaintiff in error, who was indicted for murder, urged before the court the point that when the jury retired to consider of their verdict it did not appear from the record that they were placed in charge of a sworn officer, as required by statute. The court in considering the assignment of error said:

"It was not necessary that the record should show that an officer was sworn to take charge of the jury. It was the duty of the court to have sent a sworn officer with the jury, *and if this duty were neglected such fact should appear from a bill of exceptions.*" (p. 554.)

The court in discussing other assignments of error based upon the failure of the record to disclose necessary proceedings, after showing all that the record need state, said.

"If during the progress of the prosecution motions are made and overruled, the facts can be preserved by a *special entry* on the record, or by *bill of exceptions.* In one or the other of these ways it is necessary to preserve every fact that the prisoner may deem essential to his rights, in a fair and regular trial." (p. 551.)

In *Pate* v. *People*, 3 Gilm., 644, where the same question arose, the court said:

"But the record is silent as to the fact whether the separation was with the consent of the prisoner, and it fails to show that the jury were in charge of a sworn officer when they retired to consider of their verdict. These questions arose in the case of *McKinney* v. *People*, 2

Gilm., 540, and we there held that the record need not show what disposition was made of the jury during the progress of the trial, and when they retired to agree on their verdict; that the presumption was that the court performed its duty in such respects and that if the jury were allowed to disperse without the consent of the prisoner, or retire from the bar without being in charge of a sworn officer, *it was incumbent on the prisoner, if he objected to such irregularities, to introduce them into the record by bill of exceptions.* The *presumption* from the record is that the prisoner consented to the separation of the jury, and that the court performed its duty by requiring a sworn officer to accompany the jury in their retirement." (p. 662.)

In *Holmes* v. *People*, 5 Gilm., 478, the same error was assigned and the court said:

"*The record states that the jury retired to consider of their verdict in charge of a sworn officer of the court;* and the presumption is that the court performed its duty by requiring the proper oath to be administered. If the officer was not in fact sworn, the defendants *should have objected* to the irregularity *at the time*, and if not corrected by the court *have taken a bill of exceptions.*"

In *Knouff* v. *People*, 6 Ill. App., 154, the above authorities were followed, the same error having been assigned. The court said:

"It appears *from the record* that the jury retired to consider of their verdict in charge of a deputy sheriff, but it does not appear that the proper oath was *not* administered to him. In criminal cases, it is the duty of the court to place the jury in charge of a sworn officer, but it is not necessary the record should show the fact The presumption is the court performed its duty in that regard. If the officer is not in fact sworn, the irregularity *should be objected to at the time and the point preserved by bill of exceptions.*"

In *McIntyre* v. *People*, 38 Ill., 514, this court quotes from its former opinion in the case of *McKinney* v. *People, supra,* and said:

"It is the duty of the court to send a sworn officer with the jury, and if this duty is neglected, such fact should appear *from a bill of exceptions.* In this case it appears from the evidence *embodied in the bill of exceptions* that the officer having charge of the jury at the time they retired to consider of their verdict was *not* sworn. It, however, appears that on adjournment of the court at a previous time in the progress of the trial, the officer was sworn and charged by the court, but the oath required by the statute was not administered." (p. 519.)

For this and other errors the judgment was reversed. It will be observed, however, that in the above case the failure to administer the proper oath *was embodied in the bill of exceptions*, which was not the fact in any of the preceding cases cited, or in the case at bar.

By way of comparison of recitals in the records, it may be well here to consider the only remaining cases decided in Illinois where this point was directly involved.

In *Lewis* v. *People*, 44 Ill., 462, from which counsel for plaintiff in error quotes at length, the same question was raised. But there, as stated in the opinion, "the *record disclosed the fact* that the officer in whose charge the jury was placed while deliberating on their verdict was *not* sworn."

A little different state of facts arises in the case of *Wilhelm* v. *People*, 72 Ill., 471, where it appeared that during the progress of the trial and before the evidence was all heard, the jury withdrew for a short time, for a necessary purpose, in charge of an officer of the court who was not specially sworn for that purpose. While the court regarded the oath unnecessary, it particularly pointed out that "*no objection was made* to this by plaintiff in error at or before the time, nor did he give his express consent thereto," and judgment was affirmed.

In *Sanders* v. *People*, 124 Ill., 224, the same error was assigned. The court said:

"The evidence shows that when the court adjourned at noon, the officer, who took charge of the jury was sworn by the clerk in the manner required by said section, but after the noon recess the jury returned into court, some further proceedings were had in the trial, the jury then retired 'to consider of their verdict,' but the officer who attended them was not again sworn."

The court held that this was not such an irregularity as would justify a reversal, and distinguished the case from the cases of *Lewis* v. *People, supra,* and *McIntyre* v. *People, supra,* relied upon by plaintiff in error, in the following language:

"In *Lewis* v. *People*, 44 Ill., 452, it appeared that the officer in whose charge the jury were placed while deliberating upon their verdict either was not sworn at all or was not sworn in the mode required by the statute. So also in *McIntyre* v. *People*, 38 Ill., 514, it appeared that 'the oath required by the statute was not administered.' In the case at bar, however, such an oath as the statute provided for *was* administered by the clerk to the officer in charge. The only peculiarity about it was that it was administered an hour or more *before* the jury retired, instead of being taken *at the time* or *'when'* they retired. In *McIntyre* v. *People, supra,* the officer was sworn 'on an adjournment of the court at a previous time in the progress of the trial,' just as in the present case. But there the objection was only as to the *character* of the oath and not as to the time when it was taken."

In *Jackson* v. *People*, 36 Ill. App., 88, the same error was assigned. The court said:

"The officer who was placed in charge of the jury when they retired to make up their verdict was *not* sworn as the statute requires."

The record thus positively disclosing that fact, of course the judgment was reversed.

The Appellate Court, however, in saying further that "it was the duty of the People to see that this was done, or that it was waived by an agreement entered in the minutes of the court," utterly disregarded what had been stated by the Supreme Court with regard to the necessity of the defendant preserving the point by objection and exception thereto, in the cases of *McKinney, Pate, Holmes* and *McIntyre,* above cited, as well as its earlier decision in the *Knouff* case.

It will thus be seen that in the only cases considered in Illinois where this question has been directly involved, the judgment was reversed only in those cases where it appeared of record that the jury retired in charge of officers *not* sworn according to law, as in the *McIntyre* and *Lewis* cases, and that in all other cases where the error was assigned, it not having been based upon objection and exception duly preserved, whether it appeared from the record that the jury retired in charge of a sworn officer or not, the court has declined to reverse the judgment.

Dreyer v. *People, supra.*
McKinney v. *People, supra.*
Pate v. *People, supra.*
Holmes v. *People, supra.*
Knouff v. *People, supra.*
Sanders v. *People, supra.*
Morton v. *People,* 47 Ill., 476.

In other states where the statutes require a special oath similar in form to that required by the Illinois statute, the courts have adhered to the same ruling as to the necessity of making objection to the irregularity at the time and preserving the fact by bill of exceptions.

In *Atterberry* v. *State*, 56 Ark., 515, it was urged that the jury retired from the court room to consider of their verdict in charge of an officer who had not taken the special oath prescribed by a similar statute. The court, recognizing that it presented the most difficult question in the case, and that the oath should be administered, discussed the effect of its omission and the right of the accused to a fair and impartial trial. But, said the court:

"He owes to the court fair dealing as well as candor, and should not be permitted to undo its work on account of omissions which he deemed it too trivial at the time to bring to its attention, and which were not shown or charged to have affected the fairness of the trial or prejudiced his rights. As a general rule, when the court is about to do what it should not do, or to omit what it should do, *the defendant should call attention to the threatened error and object to it*, and if the court then commits it, he must save his exception; and, *unless this is done the act or omission cannot be urged as ground for new trial.* * * * We hold that *it is too late, after verdict, to object for the first time* that the jury retired from the court in charge of an officer to whom the special oath had not been administered, where it appeared that the defendant was present when it retired and neither asked that the special oath be administered to him, nor objected to his taking charge of the jury, and it does not appear that either the officer or jury was guilty of any misconduct."

In *State* v. *Frier*, 118 Mo., 650, the defendant filed three affidavits with his motion for a new trial, as was done in this case, tending to show the separation of the jury and certain other irregularities. The court said:

"None of these matters were preserved by a recital in the bill of exceptions, and the special judge who tried the case has not certified what the truth of the matter was, further than to overrule the motion. As to those matters embraced in the affidavits, we must, *in the absence of*

some exception properly saved or some authoritative recital by the learned judge who heard the case, assume he correctly overruled the motion for a new trial."

We respectfully submit that no more apt expressions can be used to fit the case at bar, in which the retirement of the jury is also predicated upon three affidavits, and in which there is also an absence of an exception properly saved and no recital by the trial judge to confirm the contention that the officers were not properly sworn.

In *United States* v. *Ball*, 163 U. S., 662, where there was a motion for a new trial made upon the ground that the jury were not in charge of a proper officer, duly sworn, the court held that as "*no objection to his taking charge of the jury without a new oath was made at any stage of the trial*," and as there was nothing tending to show that the jury were exposed to any influence that might interfere with the impartial performance of their duties or in any way prejudice the defendant, there was no error in overruling the motion."

2.

THE LAW PRESUMES UNTIL THE CONTRARY APPEARS THAT THE COURT PERFORMED ITS DUTY, AND WHERE THE RECORD IS SILENT IT WILL BE PRESUMED THAT THE JURY RETIRED IN CHARGE OF SWORN OFFICERS.

This doctrine has been recognized in most of the cases heretofore cited. In the *McKinney* case, *supra*, the court said:

"The law presumes till the contrary appears that the court performed its duty. That it by no means follows because the record is silent as to the disposition of the jury, that the judge neglected so important a duty as to

keep the jury, charged with the life of the prisoner, from all extraneous influences." (p. 553.) * * * "We believe, that as the prisoner was in court, in person and by his counsel, that it was his duty to object to the dispersion of the jury, if indeed they did disperse; and that in the absence of all proof to the contrary we will presume that the court below performed so obvious a duty." (p. 556.)

In the *Pate* case, *supra*, the court said:

"The presumption from the record is that the prisoner consented to the separation of the jury, and that the *court performed its duty by requiring a sworn officer to accompany the jury in their retirement.*" (p. 662.)

In the *Holmes* case, *supra*, the court said:

"The presumption is that the court performed its duty in that regard."

This same presumption has been recognized in other states.

State v. *Pitts*, 11 Ia., 343.
State v. *Ryan*, 13 Minn., 370.
Clark v. *State*, 55 Tenn. (8 Baxt.) 591.
People v. *Waters*, 1 Idaho, 560.
Bennett v. *Comm.*, 8 Leigh, 745.

In this connection, as supporting this presumption, attention may be called to the ruling that a *recital in a record* that the officers placed in charge of a jury were *sworn*, sufficiently shows that they were *duly sworn*.

Holmes v. *People*, *supra*.
State v. *Nelson*, 132 Mo., 184.
Moore v. *State*, 96 Tenn., 209.
Lancaster v. *State*, 91 Tenn., 267.

3.

COURTS ARE NOT DISPOSED TO REVERSE UPON A MERE CLAIM OF SUCH IRREGULARITY, ESPECIALLY IN THE ABSENCE OF ANY SHOWING OF INJURIES RESULTING THEREFROM.

Sanders v. *People*, *supra*.
Wilhelm v. *People*, 72 Ill., 468.
Adams v. *People*, 47 Ill., 881.
State v. *Crofton*, 89 Ia., 109, 120.
Hittner v. *State*, 19 Ind., 48.
State v. *Hayes*, 78 Mo., 307.
State v. *Hays*, 78 Mo., 600.
State v. *Frier*, 118 Mo., 648.
People v. *Johnson*, 46 Hun., 667.
State v. *Poindexter*, 23 W. Va., 805.
Jarnagin v. *State*, 18 Tenn. (10 Yerg.), 529.
Stone v. *State*, 23 Tenn. (4 Humph.), 27.
U. S. v. *Ball*, 163 U. S., 662.

In the *Sanders* case, *supra*, the oath was administered before the noon recess and the jury did not retire until in the afternoon. The court said:

"The irregularity here indicated is too slight to be regarded as a ground for reversal." (p. 225.)

In the *Adams* case, *supra*, the misconduct of the jury was complained of, but in the absence of any showing of prejudice to the prisoner, the irregularity was not regarded as sufficient to justify a reversal.

In the *Wilhelm* case, *supra*, the court said:

"It is not claimed that the jury, while absent, were tampered with, or subjected to any improper influences,

and as plaintiff in error suffered no injustice by this action of the court, he has no cause to complain."

In *State* v. *Crofton, supra,* although the court held that under the statute of that state the administration of a special oath to the bailiff was mandatory, and in absence of a record as to the taking of such oath it would be presumed that the law had been complied with, yet as the error could not be availed of under the code, except upon the ground that the defendant had not received a fair and impartial trial, the court, as to that proposition, said:

"The bailiff in charge of this jury, so far as the record discloses, performed faithfully every duty which the law enjoins upon such officer. He could have done no more had he taken the oath provided by the law. No prejudice resulted from his neglect of duty."

(All of these facts appear in the case at bar from the affidavits of the bailiff. Rec., 34, 35.)

In *State* v. *Hayes,* 78 Mo., 307, an assignment of error that the jury were permitted to retire without the administration of the oath to the officer in charge, as provided in the statute similar to that of Illinois, the bill of exceptions showed that the jurors retired to consider of their verdict to the jury room and were there one and a half hours before the sheriff was sworn; but he was sworn before he had any communication with the jury and before the verdict was rendered. The court said:

"The section of the statute in question was designed to secure the jury against any outside influence, and even that of conversation with the officer in charge, and in a case where this precautionary oath is not administered, the court ought to be well satisfied that no harm resulted therefrom to the prisoner."

The court held that inasmuch as it affirmatively ap-

peared that the jury retired to the proper place assigned for them, and that the officer was sworn before he had any communication with the jury and before the verdict was rendered, there was nothing "to give color to any possible extraordinary influence upon the jury" and that it was not reversible error. (p. 314.)

In the same report, *People* v. *Hays*, 600, the same error was assigned, the record showing that the sheriff who took the jury in charge when they retired to consider of their verdict was not sworn as provided by the statute. The court said:

"This presents a question of much gravity and difficulty. * * * The record in this case shows that the jury retired, under charge of the court and sheriff, and there is no proof whatever that he or any one else even spoke to the jury during their retirement. To vacate the verdict in such a state of the case *would be an observance of the mere letter of the law without an intelligent recognition of its spirit.*" (p. 608.)

In *State* v. *Frier*, 118 Mo., 648, the court said:

"As to the failure to administer the oath to the sheriff when the jury finally retired to consider of their verdict, as the evidence shows beyond contradiction that the sheriff in no manner communicated with the jury, it cannot even be inferred that his failure to take the additional oath prescribed in section 4210 affected the verdict, and hence is no ground for a new trial." (p. 651.)

In *People* v. *Johnson*, 46 Hun., 672, the oath required by the statute was not administered. The court held that "the omission to administer the oath was an irregularity merely and did not require or justify a new trial unless there was some opportunity to conclude that the defendant was prejudiced."

In *State* v. *Poindexter*, 23 W. Va., 813, the court said that while no special oath was required, yet it was cus-

tomary for the court to administer a special oath, and added:

"It is not pretended that the jury had not been kept together, or the sheriff or his deputies had not properly discharged their duties to the prisoner, or that he had been in any manner injured by acts of the sheriff or his deputies. We are of the opinion, therefore, that the court did not err in overruling the prisoner's motion."

In *Jarnagin* v. *State,* 18 Tenn. (10 Yerg.), 529, the court said:

"It is said that the jury retired to consider of their verdict into a room of the building in which the court was held, accompanied by an officer. It does not appear that an officer was necessary, that the jury improperly separated or that any communication of any sort was had with them by persons not of their body, so that there is no error in this."

In *Stone* v. *State,* 23 Tenn. (4 Humphrey), 27, it was shown by the bill of exceptions that the sheriff, who was not the sworn officer of the jury, had charge of them at a period of time when the constable was absent, but that he had said nothing to them about the trial. The court, after reviewing the precautionary measures to bring about fair and impartial verdicts, and stating that if the jury had been disqualified from considering the case properly it would have been the duty of the court to have awarded a *venire facias de novo,* said:

"That he didn't do so, we must in the absence of proof come to the contrary conclusion and hold that the slight irregularities complained of were entirely innoxious to the prisoner. As to the separation of the jury complained of and the introduction of the sheriff into their room, all that is necessary to observe, in view of the principle just laid down, is that it is shown satisfactorily to our minds, that whatever little separation took place was casual and of no importance, that there was no tampering or oppor-

tunity for tampering furnished by it, and the sheriff expressly swears that he did not speak to the jury about the case."

See, also,

United States v. *Ball*, 163 U. S., 662, 674, before quoted.

4.

THE RECORD IMPORTS VERITY, AND ITS CONCLUSIVENESS CANNOT BE IMPEACHED BY AFFIDAVIT.

Eastman v. *People*, 93 Ill., 112.
Henning v. *State*, 106 Ind., 386, 390.
Polin v. *State*, 14 Neb., 540, 549.
State v. *Frier*, 118 Mo., 650.
Van Houston v. *People*, 22 Colo., 53.

In the Eastman case, *supra*, where, as it appears from the bill of exceptions, the defendant made an application to the court to address the jury, which it in effect denied, this court said:

"Admitting that this amounted to a refusal on the part of the court to permit the accused to appear in person in her own behalf, and that she was thus deprived of a constitutional right, still upon the record before us we cannot say there was error. The record wholly fails to show that any exception was taken to the rulings of the court with respect to her application to go before the jury in person, and it therefore follows this court is precluded from reviewing the action of the court in regard to it. This is so well settled and understood by the profession that argument or citation of authority would be useless. * * * Can there be anything more thoroughly settled and universally understood than that a court of review can only look *at the record* before it, and that in determining the rights of the parties thereto *it must accept the record as absolute verity?* Even if the members of the

court personally know a fact important to the rights of a party, which by innocent mistake or fraudulent design has been omitted in making up the bill of exceptions, they would be powerless to act on such knowledge. We must therefore conclusively presume, in this as in all other cases, *that the bill of exceptions speaks the facts as they really exist.*"

In the *Henning* case, *supra*, the defendant was convicted of murder. It was urged that the jury was permitted to separate during the trial without his knowledge or consent or that of his counsel. The bill of exceptions recited these facts and the further fact that the attention of the court was not called to the absence of the defendant and his counsel until the following morning. Both the defendant and his counsel filed affidavits in support of a motion for a new trial to the effect that the order for such separation was made in the absence of the defendant and his counsel, and further setting up that the defendant was forcibly removed from the court room. The court said:

"But if we treat it as a statement of fact, it cannot prevail against the statement of the court as to what took place, since it is a familiar rule that where the court puts on record a statement of what occurred in its presence, *it cannot be overcome by the affidavit of a party.*" (p. 390.)

In the Missouri case of *State* v. *Frier*, *supra*, three affidavits in support of a motion for a new trial tending to show the separation of the jury in a murder case, were held unavailing as against the record in which these matters were not preserved in a bill of exceptions, and it was assumed that the trial judge as to those matters correctly overruled the motion for new trial.

In *Polin* v. *State*, 14 Neb., 549, affidavits in support of a motion for new trial, charging the separation of the jury, upon a murder case, were unavailing.

In *Van Houston* v. *People,* 22 Colo., 57, it was undertaken to show by affidavits that during the examination of one of the jurors the defendant voluntarily absented himself from the court room for a few minutes. The court said:

"The record shows the personal presence of the defendant, and it cannot be contradicted in the manner resorted to in the case."

Even the affidavit of the trial judge to the fact that the record is erroneous and stating that the parties waived a jury was held not to change the record.

Smith v. *Brannan,* 13 Cal., 115.

The record in the case at bar discloses, as before stated, that *"the jury heard further arguments of counsel that the instructions of the court, and retired in charge of sworn officers to consider of their verdict."* (Rec., 19.) It must therefore be regarded as stating the fact that the officers were *sworn.* As heretofore shown, every presumption to support it will be indulged, and from the recital that the officers were sworn it will be presumed that they were *duly* and *regularly* sworn.

If the record does not state the truth, then the only way it could have been changed was by amendment.

Such recourse was open to the plaintiff in error. The term had not expired when he entered the motion for a new trial, and one of his counsel claimed to have been cognizant of the irregularities at the time. He so stated with great particularity in his affidavit. (Rec., 32.)

Had an application been made during the term, the court below might have entertained the affidavits filed for that purpose. But the record cannot be impeached by them.

In fact, if the court had believed from the affidavits filed that there was error in making up the record, the record could have been amended "by direction of the court without any formal application for that purpose."

Weed v. *Weed,* 25 Conn., 337.

Kelly v. *High,* 29 W. Va., 381.

As stated in *Weed* v. *Weed, supra:*

"Whether there was a mistake in the record was a question of *fact* for the court below, to be established, as any other fact in a court of justice, by proper evidence, * * * and it was for the court upon that evidence to say whether in fact a mistake had been made which required correction."

Presumably the court below, from the affidavits and evidence before it, *deemed the record correct* in stating that the jury retired in charge of sworn officers.

Therefore, whatever may have been the facts, the record not having been amended, it must be taken as conclusive. Its truth cannot be questioned.

The extraordinary procedure resorted to in this case was by procuring the affidavit of the very clerk who made the record to swear that it was not true. If a record may thus be successfully impeached, it is difficult to see what safety there is in judicial proceedings and what guaranty there may be in the future as to the verity of court records.

If such be the practice then he or some other officer of the court, or some outsider, pretending to be cognizant of the real fact, may after an adverse verdict impeach any other entry in the record, of a necessary proceeding in the trial, like an arraignment, or a plea, or the swearing of the jurors. Such practice would put a premium on rascality.

All that any defeated party or convicted criminal need then do to impeach and discredit the record of his case would be to induce, by corrupt methods or otherwise, some dishonest clerk or willing detective to make affidavit that some prerequisite to a legal trial has been omitted or irregularly performed, and thus defeat the ends of justice. No court will lend its sanction to a practice which invites fraud and corruption into judicial proceedings.

The action of trial court in not reciting the fact to the contrary in the bill of exceptions, was tantamount to deciding the fact as it stood of record. While affidavits stating the bailiffs were not properly sworn have been brought into the record by the bill of exceptions, they do not thereby change the record already existing, to the effect that the officers in charge of the jury were duly sworn. They have no more effect here than they had in the court below, namely, *that of questioning the accuracy* of the record, and if the record was not accurate, plaintiff in error's only recourse was to have it amended by the court who heard the affidavits and evidence. In fact, after the Illinois Supreme Court had decided this case adversely to the plaintiff in error, he sought, in view of the holding of the court that the question was not properly raised upon the record by "objection or exception taken by the defendant at the time of the retiring of the jury that the officers in charge of it were not sworn, but the question was raised by him for the first time in his motion for new trial," and in view of the further holding that said fact "may be shown by affidavits heard on the motion for new trial embodied in the bill of exceptions (the inconsistency of which holdings was pointed out in a separate opinion by Mr. Justice Cartwright) to amend the record by a finding of the trial court based upon such affidavits

to the effect that the officers in charge of the jury were not sworn as required by law. Such amendment was allowed and upon the motion for a rehearing before the Supreme Court, a diminution of the record in this respect was suggested. But the court held that the amendment allowed by the trial court was improper; that while, during the term, the trial court might have considered such affidavits for such purpose, after the expiration of the term it could not resort to the information furnished by such affidavits to change the record.

Dreyer v. *People*, 188 Ill., 64.

Such decision was more in keeping with the separate opinion of Mr. Justice Cartwright, which pointed out, as before stated, the apparent inconsistency of the main decision, and might also call in question the soundness of that decision in also holding that the recital of the record that the officers in charge of the jury were sworn, was an unnecessary recital and perhaps not properly a part of the record.

Is a record of a case limited to only those matters which must necessarily appear, or to matters which must appear to show jurisdiction? We are not aware of any rule so stringent. On the contrary, it appears from many of the very cases we have been considering, and especially the Illinois cases, that the very point urged with respect to the administration of the oath to the officers in charge of the jury has been decided from the *recital* with respect thereto, *and it does not* appear that it was a mere fact brought into the record by a *bill of exceptions*, but in most, if not all, of the cases appears, as in the case at bar, to have been a *recital in the entry made at the time*.

Can it be that an act, which is not only a part of the

necessary procedure of a criminal case, but is an act to be performed *by the court* or under its direction, and which if omitted and the fact so appear of record, vitiates the proceedings, is not a part of the record because it is not absolutely necessary for the record to state it?

We apprehend that it is a safe principle that the entry in the records of the court of any act essential either to its jurisdiction or a legal trial, becomes a part of that record, which cannot be disregarded.

It is not like an objection, an affidavit or a motion, the act of *one of the parties*, but an act of *the court* independent of them, which is thus recorded. In other words, it is what it purports to be, the record of the *court's action* with respect to essential steps in a legal trial.

5.

THE ACCUSED HAS NO RIGHT TO STAND BY AND SUFFER IRREGULAR PROCEEDINGS TO TAKE PLACE, AND THEN ASK TO HAVE THE PROCEEDINGS REVERSED ON ERROR, ON ACCOUNT OF SUCH IRREGULARITIES. IF HE NEGLECTS IN PROPER TIME TO INSIST ON HIS RIGHTS, HE WAIVES THEM.

Dreyer v. *People*, 188 Ill., 40.
McKinney v. *People*, 2 Gilm., 556.
Chase v. *People*, 40 Ill., 352.
Eastman v. *People*, 93 Ill., 113.
Dyer v. *People*, 84 Ill., 624.
Kelly v. *People*, 132 Ill., 371.
Atterberry v. *State*, 56 Ark., 515.
Henning v. *State*, 106 Ind., 386, 392.
Waterman v. *State*, 116 Ind., 51.
Polin v. *State*, 14 Neb., 540, 549.
Hunter v. *People*, 43 Ga., 483.

It is one of the extraordinary features of the case at bar that one of the counsel for defendant below went so far to render positive his contention that the bailiffs were not properly sworn, in form or in time, as to assert in his affidavit that he had the very matter in mind when the clerk administered the oath to the bailiffs, *having devoted much study to it*, and particularly observed the neglect complained of. (See affidavit of Attorney Austrian; Rec., 32.) In other words, observing, as he claims, irregular proceedings, which, if properly shown by the record, would vitiate the proceedings, without rendering any complaint or calling the attention of the court thereto in time to correct the error, he elected to go on and *speculate* upon the verdict, intending doubtless to receive the benefit of it if an acquittal, and claim error if a conviction.

In the *McKinney* case, *supra*, upon the very point in question the court said:

"A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglect, in proper time, to insist on his rights, he *waives* them." (p. 556.)

In *Atterberry* v. *State*, 56 Ark., 515, the defendant urged, as in this case, that the oath was not administered to the officers in charge of the jury. The court said:

"He owes to the court fair dealing as well as candor, and should not be permitted to undo its work on account of omissions which he deemed it too trivial at the time to bring to its attention, and which are not shown or charged to have affected the fairness of the trial or prejudiced his rights. As a general rule, when the court is

about to do what it should not do, or to omit what it should do, the defendant should call attention to the threatened error and object to it, and if the court then commits it, he must save his exception, and unless this is done the act or omission cannot be urged as ground for a new trial. This rule applies to the exclusion of proper or the admission of improper evidence; to the refusing of proper or the giving of improper instructions. *It rests upon the duty of dealing fairly with the court, which forbids that a losing litigant should complain of errors which the court might and presumably would have avoided, or cured in apt time, if they had been called to its attention.* * * * We hold that it is too late, after verdict, to object for the first time that the jury retired from the court in charge of an officer to whom the special oath had not been administered, where it appeared that the defendant was present when it retired and neither asked that the spespecial oath be administered to him nor objected to his taking charge of the jury, and it does not appear that either the officer or the jury was guilty of any misconduct. It appears from the record in this case that the jury retired in charge of an officer acting under the general oath of his office, and that the defendant and his attorney were present, but it does not appear that he asked the court to administer the special oath, or objected to the officer taking charge of the jury."

In *Henning* v. *State*, 106 Ind., 393, after reviewing various authorities on waiver, the court said:

"These authorities clearly establish the general doctrine that if a defendant has knowledge of a matter affecting his rights and fails to ask a ruling upon it, or if he fails to avail himself at the earliest opportunity of objections known to him, he cannot afterwards successfully complain. * * * Of course, this principle can have no application where the ground of complaint, whether it be the action of the court or the misconduct of a jury, is not known to the accused until after verdict, *but it does apply where, as here, the action of the court and the conduct of the jury are fully known to the defendant.*"

In *Waterman* v. *State*, 116 Ind., 51, the court said:

"It is insisted, next, that the court erred in overruling appellant's motion for a new trial on account of the alleged misconduct of the jury in permitting the presence of the bailiff in the jury room during their deliberations. All that appears of record upon that subject is the affidavit of appellant's counsel. * * * In the present case, however, the affidavit of appellant's counsel discloses the fact that counsel saw the bailiff go into the jury room without any invitation or signal from within, and that this was repeated again and again in his presence, without protest or objection, although counsel was present in court at the time. In whatever light counsel may have regarded the conduct of the bailiff after an adverse verdict was returned, it does not seem to have impressed him as being of sufficient consequence at the time as to justify mention to the court. *Misconduct on the part of anyone connected with the trial, which is known to and acquiesced in without objection by the party or his counsel, as here, even though it be of a character which might otherwise vitiate the verdict, cannot afterwards be made available as ground for setting aside the verdict.*"

In *Polin* v. *State*, 14 Neb., 540, affidavits showing separation of a jury (in a murder case) were filed in support of a motion for a new trial. The fact was known at the time by prisoner's counsel, yet "no complaint was made to the judge, but the trial was permitted to proceed without objection till after verdict." The court said:

"If the separation were thought to be at all prejudicial to the prisoner, it ought to have been brought to the notice of the judge at once, on discovery, so that an investigation could have been made, to the end that, without further fruitless expense, if justice required it, the trial could have been stopped, that jury discharged and a new one impaneled to try the case. *Parties litigant, even defendants in criminal cases, must deal fairly by the court. They are not permitted to withhold information on matters transpiring in the progress of a trial, whether prejudicial or otherwise, and then without objection permitted to pro-*

ceed to a conclusion, and then take advantage of them. Generally all objections not *jurisdictional* as to the subject of litigation must be made at the first opportunity, or they are deemed to be waived. The rule in such cases is, *to take chances of a favorable result, and then, if disappointed, for the first time complain.*" (p. 550.)

In *Dyer* v. *People*, 84 Ill., 624, where a party failed to object to an apparent variance at the trial, the court said:

"A party will not be permitted to lie by and reserve such technical objection to be urged on error in this court."

But it may be contended that the provisions of the statute requiring the officer in charge of jurors, when they retire, to be sworn, are such that there can be no waiver except by express consent entered upon the minutes of the court. This, however, can only be maintained from a misapprehension of its meaning. It states that when the jury retire to consider their verdict, the officer shall be sworn to attend the jury, to keep them together, suffer none to speak to them, and return them into court after verdict. (Sec. 14, Div. XIII, Ch. 38, Ill. R. S.) Thus far it requires no more than is required under the common law practice (1 Bish. Crim. Pro., Sec. 998; 1 Chit. Crim. Law, 632) according to which all criminal trials are still required to be conducted, except when the statute points out a different mode. (Ill. R. S., Ch. 38, Div. XIII, Sec. 8.) The statute referred to contains a proviso that the parties may, in cases of misdemeanor only, "agree, which agreement shall be entered upon the minutes of the court *to dispense with the attendance* of an officer upon the jury, or that the jury when they have agreed upon their verdict may write and seal the same and after delivering the same to the clerk *may separate.*"

Although this provision for dispensing with the attendance of an officer and permitting the jury to separate after verdict seems to relate to cases of misdemeanor only, and does not contemplate that these matters may be done in a case of felony, yet the courts have held both requirements by neglect to object in proper time to have been waived. However, the administering of an oath to the officer and the requirement of his attendance upon the jury are two different matters. If it be held that under our statute his attendance upon the jury in a case of felony cannot be dispensed with or even waived, yet there is nothing in the statute to preclude the application of the doctrine of waiver to the administration of the oath to the officer that may be in attendance upon the jury. In other words, his *attendance* can be dispensed with only by an agreement entered upon the minutes of the court, but the provision in no respect changes the requirement of an *oath*, which was as obligatory before the passage of the statute as since, and if it could have been waived prior to the passage of the statute or under the common law practice, as already shown, there is no reason in logic why it cannot be waived since the enactment of the statute, which does not expressly provide that a *dispensing of the oath* must be by consent.

Equally important rights to the defendant, even his constitutional rights, have been held to have been waived.

In *Chase* v. *People*, 40 Ill., 352, it appeared that one of the jurymen was an alien, but it was held too late to assign that as error, the defendant failing to exercise his right of challenge for cause and to take exception.

In the *Eastman* case, *supra*, it was held that the Supreme Court was precluded from reviewing the action of

the Circuit Court in denying the defendant the privilege of making a statement in person to the jury after her counsel had spoken, when the record failed to show that any exception was taken to the ruling.

In *Kelley* v. *People*, *supra*, the court the, although the statute does not so provide, that the defendant should have made a demand before arraignment for a copy of the indictment, and upon being refused should have excepted and presented the facts of the demand and refusal and exception by bill of exceptions, and not having done so could not be heard to complain. (p. 371.)

The statute with respect to the duty to furnish the accused such copy (Sec. 1, Div. III, Ill. R. S., Ch. 38) in requiring that every person charged with crime "shall be furnished previous to his arraignment with a copy of the indictment and a list of jurors and witnesses" is as peremptory as the statute in question; and yet, this important requirement was held to have been waived in the above case.

In the following cases, the constitutional right of accused to be confronted by the witnesses was held to have been waived:

Reynolds v. *U. S.*, 98 U. S., 145.
U. S. v. *Sacramento*, 2 Mont., 239.
Williams v. *State*, 61 Wis., 281.
Rosenbaum v. *State*, 33 Ala., 354.
Price v. *State*, 36 Miss., 533.

In the following cases his constitutional right to be present at the trial was held to have been waived.

Sahlinger v. *People*, 102 Ill., 241.
State v. *Kelly*, 97 N. C., 404.
Fight v. *State*, 7 Ohio, 327.
State v. *Wamire*, 6 Ind., 357.
Barton v. *State*, 67 Ga., 653.

In the following cases the failure to object to the separation of a jury in the trial of a capital case, when known by the defendant, was held to have been waived.

Henning v. *State*, 106 Ind., 386, 392.
Polin v. *State*, 14 Neb., 540, 549.
U. S. v. *Gilbert*, 2 Sumner, 19.

II.

Not Twice In Jeopardy.

THE PREVAILING RULE IS THAT THE DISCHARGE OF A JURY WITHOUT THE CONSENT OF THE DEFENDANT, BECAUSE, AFTER MATURE DELIBERATION, THEY ARE UNABLE TO AGREE UPON A VERDICT, IS NOT AN ACQUITTAL AND DOES NOT ENTITLE THE DEFENDANT TO IMMUNITY FROM FURTHER PROSECUTION. WHETHER THEY CAN AGREE IS A QUESTION FOR THE SOUND DISCRETION OF THE COURT.

As appears in the statement of facts, the contention that the jury having been discharged for inability to agree at a former trial, and the defendant having again been placed on trial was thus twice put in jeopardy, rests solely upon these facts as they appear from the record, namely, the entry upon the record September 2, 1899, declaring that the jury "*being unable to agree upon a verdict are thereupon by order of this court discharged from further consideration of this cause;*" and the evidence of the witness Bachrach that the jury retired to consider their verdict on September 1st, about 5 P. M., and were discharged by the court the following morning about 10 A. M., which also appears of record excepting as to the recital of the hours. Counsel for plaintiff in error, in his argument upon this question, predicates his proposition

upon another alleged fact, which does not appear of record but proof of which was expressly excluded, namely, "the objection and protest of defendant to such discharge." However, it would matter little whether that were a fact, as the authorities are conclusive upon the question that where the necessity exists for the discharge of the jury the prisoner's consent is not required, and that the court is the judge whether the necessity exists.

The diversity of opinion upon this subject has arisen mostly upon the question as to whether the inability of the jury to agree is of itself such a *necessity* as to render their discharge legal without the consent of the defendant. One class of cases, namely, those relied upon by plaintiff in error, restrict the right to discharge the jury without such consent to cases of so-called "legal" or "physical" necessity. Another class of cases, far greater in number and now recognized as the better authority, regard the inability of the jury to agree, after reasonable or mature deliberation, as such a necessity as justifies the court in discharging the jury. Some of these authorities declare that such necessity must have appeared from the record to have existed; but that the entry of the fact that the jury are unable to agree upon the records of the court implies a finding of the court to that effect. There is still a further division of authorities as to whether it is a discretionary power with the court. However, the courts denying that it is a discretionary power hold that the entry upon the record that the jury are unable to agree involves the finding of the fact that such necessity existed.

We shall not attempt to cite all the authorities favoring the propositions above laid down. We shall quote enough to demonstrate that the weight of authority is in

support of our proposition, and is so recognized by the principal text writers.

Proffatt on Jury Trials, Section 484, lays down the doctrine in the following language:

"It was formerly held by many of the American courts that in capital cases it was no sufficient ground to warrant the discharge of a jury without the consent of the accused, when they were unable to agree upon a verdict; and that if a jury were discharged, without the prisoner's consent, before they had agreed, it constituted a bar to any further prosecution for the offense. But in these cases it is admitted that there may be sometimes a necessity so invincible and uncontrollable as to justify the discharge of a jury in capital cases."

Section 485:

"The necessity justifying a discharge may be variously estimated; for what one might consider to be a case of justifiable, uncontrollable necessity might by another be deemed capable of avoidance and control, and by no means insuperable. The view now obtains that a 'necessity' of that extreme and uncontrollable character exists to justify the discharge of a jury, when, after a reasonable confinement, and after full instructions, the jury find an utter inability to come to an agreement in respect to their verdict."

1 Bishop on Criminal Law (6th Ed.), Sec. 1033, declares the law to be as follows:

"In England and Ireland, and at present in the greater part, if not all, of the states, when a reasonable period for discussion and reflection has been given the jury, and they have in open court declared themselves unable to come to an agreement, and the judge is satisfied of the truth of the declaration, they may be discharged and the prisoner held to be tried anew."

And this doctrine is applied as well in felony as in misdemeanor; and in support of this position the author cites a long list of cases.

Archbold, in his work on Criminal Practice and Pleading, declares, Vol. 1, p. 593, that

"The general rule is that the jury must be kept together from the time they are first charged with the prisoner or defendant until they deliver their verdict, unless the prisoner consents to their being discharged or for causes occurring in which the judge, from necessity, is obliged to discharge them. If they cannot agree upon their verdict and they appear not likely to do so, the judge, chairman or recorder, in the exercise of his discretion, may discharge them as soon as it becomes a matter of necessity, of which he is the judge, and he usually discharges them after they have been one night locked up in the jury-room, deliberating on their verdict."

In Graham & Waterman on New Trials, Vol. 11, page 118, the rule is laid down in the following language:

"So long, therefore, as it is the truth that is sought by the verdict, and not an empty form, the protracted confinement of juries who are unable to agree is more calculated to defeat than to promote the ends of justice; and their discharge, under such circumstances, ought not to operate as a bar to further proceedings."

And, continuing, on page 122, the same author says:

"The discharge of a jury in a criminal case, without agreeing on a verdict, is a matter resting in the sound discretion of the court in which the trial is had."

On page 127, same volume, the author quotes with approval Judge Crabb, who declares in the case of *The State* v. *Waterhouse*, Martin & Yerg. (Tenn.), 278:

"In the United States I find a weight of coincident adjudications, which I cannot, I believe, with propriety resist. The Supreme Court of Massachusetts, the Supreme Court of New York, and above all the Supreme Court of the United States, fitted more than any other tribunal, from the necessary habits and researches of its members, to decide upon American constitutional law, have, without, so far as I can discover, a dissenting voice, all held

that a court, in the exercise of a sound discretion, may discharge a jury, even in a capital case; and that the defendant may be tried again."

In *U. S.* v. *Perez*, 9 Wheat., 579, it was held that the discharge of the jury from giving a verdict in a capital case without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offense. Mr. Justice STORY said:

"We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, if in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated. * * * We are aware that there is some diversity of opinion and practice on this subject in the American courts, but after weighing the question with due deliberation we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

We will briefly review other decisions of like import.

ALABAMA.

While in most of the cases decided in Alabama the question has arisen whether the jury could be discharged before the end of the term, and the courts have held, as in *Ex parte Vincent*, 43 Ala., 402, that the defendant was entitled to he whole term to have his case disposed of *"unless some necessity intervened which rendered this impracticable or impossible,"* yet the courts of that state have distinctly recognized that such necessity "need not be physical," and in *Battle's* case, 7 Ala., 259, the jury were discharged on the same day the case was submitted to them for inability to agree, the court above holding

"that it would presume (the contrary not appearing) that a reasonable time had been allowed for the jury to consider of their verdict."

In *Barrett* v. State, 35 Ala., 406, where *Battle's* case was approved upon a similar state of facts, it recognized and said:

"That a case which the law recognizes as a moral necessity does exist when the business of the court, other than the particular criminal case, has been disposed of, and the jury have so long considered of their verdict, without agreeing, as to indicate the absence of all probability that they would unite upon a conclusion; and in the determination of the question whether the jury have considered the case for a reasonable time, or until there is no probability that they will agree, *something must be left to the judgment and discretion of the court which tries the case.*"

CALIFORNIA.

In *Ex parte McLaughlin*, 41 Cal., 211, the record recited that the jury stated their inability to agree, and against the prisoner's objection were discharged. It was contended that such discharge was without "legal necessity."

The court said:

"Upon this point the authorities furnished by adjudicated cases in our sister states largely preponderate in the affirmative, and the most prominent of which are: *Comm.* v. *Purchase*, 2 Pick., 520; *People* v. *Goodwin*, 18 Johns. (N. Y.), 187; *Hoffman* v. *State*, 20 Md., 425; *State* v. *Updike*, 4 Harr. (Del.), 581; *State* v. *McKee*, 1 Bailey (S. C.), 655; *Wellford* v. *State*, 23 Geo., 1; *State* v. *Barnett*, 35 Ala., 406, substantially overruling the case of *Ned* v. *State*, 7 Porter, 210, and other cases previously decided in the same state and holding the opposite view; *Price* v. *State*, 36 Miss., 533; *Dobbins* v.

State, 14 Ohio St. R., 492; *State* v. *Walker,* 26 Ind., 346, and *State* v. *Nelson,* 26 Ind., 366, overruling the case of *State* v. *Miller,* 8 Ind., 326, and other cases in the same court holding contrary doctrine upon this point.

"Opposed to the above authorities upon the point in hand, I have been able to find but *four* states, viz., Pennsylvania, Virginia, North Carolina and Tennessee; and the courts of Pennsylvania and Virginia both hold the affirmative in all criminal prosecutions for less than capital offenses. * * *

"The action of the court in discharging the jury in the present case, and holding the petitioner for re-trial, is sanctioned by our statute, by the uniform practice of all our courts and by a large preponderance of judicial authority from our sister states, and is, in my judgment, in accordance with enlightened principles of law and justice, not in contravention of any right secured by our constitution, and should be sustained."

It is true that there was an express provision in the statute of California, authorizing a court to discharge a jury "if it satisfactorily appear that there is no reason or probability that the jury can agree." But that statute was claimed by the relator, McLaughlin, in that very case, to be unconstitutional in that it deprived the prisoner of his constitutional right of not being placed twice in jeopardy, as provided for in the constitution of that state. In other words, it was held in that case, that neither the statute nor the action of the court pursuant thereto, deprived the prisoner of his constitutional rights of not being placed in jeopardy the second time.

Connecticut.

In the case of *The State* v. *Woodruff*, 2 Day (Conn.), 504, the Supreme Court of that state approves of practice prevailing in the State of New York, under which a

court may discharge a jury when it is unable to agree, in the following language:

"The point now under consideration has undergone a very full and able discussion in the State of New York, and the right to discharge a jury who are unable to agree and afterwards being the defendant to trial before another jury has been asserted and established."

And quotes English authorities, showing "that the jury may be discharged in capital cases" and "that in cases not capital the prisoner's consent is not necessary."

Delaware.

In *State* v. *Updike*, 4 Harr., 581, where the jury was discharged for inability to agree without the prisoner's consent, the contention that a second trial placed him twice in jeopardy was abandoned as untenable, upon the authority of *U. S.* v. *Perez*, 9 Wheat., 579.

Georgia.

In *Williford* v. *State*, 23 Ga., 1, against the objection of the prisoner, the court on its own motion entered the order:

"It appearing to the court that the jury impaneled and sworn to try this case are unable to agree, it is therefore ordered by the court that a mistrial be declared and awarded, and that the jury be discharged."

Upon the action of the court in refusing to discharge the prisoner, the Supreme Court said:

"Anciently the doctrine was much more rigid upon this subject than at present. * * * At the present day the question seems to be left pretty much to the *discretion* of the judge, under his responsibility to the county for any abuse of his authority; and we are not

prepared to hold that this discretion should be otherwise limited." * * *

In the case of *Lester* v. *The State*, 33 Ga., 329, the jury being unable to agree upon a verdict, the court, on motion, entered an order reciting the inability of the jury to agree after long deliberation, and declaring a mistrial and discharging the jury. When the case was called at the ensuing term the prisoner pleaded former acquittal, on the ground that the mistrial was declared by the court without the consent of the accused. The state demurred to the plea, the court sustained the demurrer and ordered the plea stricken out and the defendant to plead over. The Supreme Court declared:

"We are clear that the decision of the court below was right. Whenever a jury in a case like this is discharged by the court from the further consideration of the cause, because of the impossibility of the jury's agreeing on a verdict, or on account of the illness of a juror, the prisoner or the court, such a discharge is an *absolute necessity*, and does not and cannot operate as an acquittal of the accused."

ILLINOIS.

This precise question does not seem to have been raised in the Supreme Court of Illinois until the rendition of its decision in the case at bar.

The Appellate Court, however, had previously, in the case of *Logg* v. *The People*, 8 Ill. App., 106, inclined to the position taken by the courts of New York, Massachusetts, Texas, and the other states herein referred to. On page 106 of that volume the Appellate Court declares that:

"Where an obvious necessity arises from some matter occurring during the trial that could not be foreseen or

prevented for discharging the jury, the court has the undoubted power to discharge them without releasing the defendant, even though such action be taken against his objection, *as where the jury are unable to agree,* and longer confinement would be unreasonable."

(Citing *Nugent* v. *The State*, 4 Stewart & Porter, 72.)

INDIANA.

In *State* v. *Nelson*, 26 Ind., 366, whether the defendant ant had been put in jeopardy by a discharge of the jury on the court's motion, defendant objecting, because the jury stated that there was no probability that they could agree, the court practically disapproved of any previous rulings in that court to the contrary by saying:

"Differing, then, from the spirit of what has been heretofore held in this state, and from the doctrine held in *Pennsylvania, Tennessee, Virginia, North Carolina* and *Alabama*, we are, however, in accord with the Supreme Court of the United tSates, and of *Massachusetts, Mississippi, New York, Illinois* and *Kentucky.*"

In *State* v. *Walker*, 26 Ind., 347, where the same question arose and the authority of the several states were reviewed, the court recognized the "*discretionary power*" in the courts in discharging jurors for inability to agree over objections by the prisoner, and said:

"The length of time they were engaged in consultation was sufficient to enable them to determine the possibility of agreeing, and the court, we must presume, was entirely satisfied that to hold them longer would not result in a verdict, and therefore discharged them."

In *Shaffer* v. *State*, 27 Ind., 131, on a similar state of facts, it was also held that the discharge of a jury in a criminal case, without the consent of the accused, after ample time spent in deliberation, because of their ina-

bility to agree on a verdict, does not entitle the defendant to his discharge.

In the case of *State* v. *Wilson*, 50 Ind. 487, the following state of facts was disclosed: On the trial for murder the jury deliberated upon a verdict for thirty-two hours, and then answered that there was no probability of their agreeing upon a verdict, and the court discharged the jury without the presence of the defendant, he being confined in jail. Upon a second trial he pleaded this action of the court in bar of further prosecution, and in passing upon the question the court said:

"We are of the opinion that the discharge of the jury under the circumstances averred in the plea would have been proper, *if the appellant had been present in court*, even though he objected to the discharge, unless he had some good ground why the jury should not have been discharged, and in such a case the discharge could not have been pleaded in bar of further prosecution of the case."

MARYLAND.

In *Hoffman* v. *State*, 20 Md., 425, this precise question was not involved, but the court went even further in declaring that a party had not been in jeopardy where the court, after the jury were empaneled and sworn, discharged them without hearing evidence, against the objection of the defendant.

MASSACHUSETTS.

In *Commonwealth* v. *Purchase*, 19 Mass., 521, it was held upon a trial for murder that where the jury had been deliberating for eighteen hours without being able to agree upon a verdict, and that where it appeared that

further deliberation would have no tendency to bring about an agreement, that they were properly discharged, and that the prisoner could not afterwards successfully raise the plea of former jeopardy.

To the same effect is the case of

Commonwealth v. *Bowden*, 9 Mass., [illegible]

In the former case the court said:

"The principle being admitted that *necessity* is to control the operation of the rule, it follows, of course, that the *court must judge* when the case has happened which will justify them in discharging the jury." (Page 523.)

MICHIGAN.

In *People* v. *Schoeneth*, 44 Mich., 488, the court said:

"There is no claim, and the record affords no ground for saying that the recorder did not act with due discretion in discharging the jury without a verdict. The statement is express that they were 'unable' to agree, and if that was true it became the judge's duty to discharge them, and the prisoner was not thereby relieved from further prosecution. The doctrine is too well-settled to justify discussion."

In *People* v. *Harding*, 53 Mich., 487, the court declared:

"There is no doubt that the report of a jury that they cannot agree is proper evidence upon which the judge should act in determining upon the impossibility of their reaching a verdict. The whole subject is referred to his judgment, and when he decides no one can question his conclusion."

It is true, that in the State of Michigan, there is no constitutional provision similar to that in the State of Illinois, relating to being placed in jeopardy. The provision of the Michigan constitution is that "No person, after

acquittal upon the merits, shall be tried for the same offense." None the less, as is pointed out in that case, the Supreme Court of the State of Michigan has always construed this provision an entitling the accused to the rights given him by the common law. On page 485 the court uses this language:

"This court in its decisions has in several cases given the accused parties the benefit of the common law relief respecting legal jeopardy, in cases where on a former trial the case was disposed of without passing upon the merits."

It thus appears that the Supreme Court of the State of Michigan passed upon the question of former jeopardy, as it existed at common law.

Mississippi.

In *Whitten* v. *State*, 61 Miss., 723, the court declared: "Undoubtedly the inability of the jury to agree, after sufficient deliberation, warrants a discharge."

But in that case it held that three and a half hours was insufficient time for deliberation.

In *Price* v. *State*, 36 Miss., 543, the court, in discussing the discretionary power of a judge to discharge a jury in criminal cases, approved of the doctrine as laid down in 9 Wheaton, *supra*.

New York.

In *People* v. *Greene*, 13 Wend., 57, the jury were out thirty minutes and were discharged. The court held that the prisoner was not in jeopardy thereby, and declared that "temperate discussions may produce unanimity, and

time should be allowed for that purpose; but when such time has been allowed, and the court becomes satisfied that there is no reasonable prospect of agreement by further discussion, it then becomes its duty to discharge." (Page 58.)

In *People* v. *Goodwin*, 18 Johns. Cases, 205, is passing upon the action of the lower court, in discharging the jury after seventeen hours' deliberations, the court declares:

"In the present case, considering the great length of time the jury had been out, that the period for which the court could legally sit was nearly terminated, and that it was morally certain that the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal,"

and held that the discharge, under these circumstances, was not jeopardy.

North Carolina.

In the case of *State v. Jefferson*, 66 N. C., 312, the Supreme Court of that state held that

"Had his Honor remained at the court until Saturday night, ready to instruct the jury, after finding the fact that the case had been with the jury four days, and that from declarations of the jurors in the presence of the others, and in open court before him, he is satisfied the jury would not agree, and that it was useless and not necessary for the purposes of the case to continue the term longer, and thereupon discharged the jury, there would have been no error."

Ohio.

In *Dobbins* v. *State*, 14 Ohio St. Rep., 494, the court came to the same conclusion as that the court may dis-

charge the jury for inability to agree without consent of the prisoner, and further trial be had, but while differing with authorities that it is a matter of *discretion* with the court below, said that the facts upon which the necessity was said to exist must have been considered and passed on by the judge in *the entry of the order for the jury's discharge.*

Rhode Island.

In *State* v. *Nelson,* 35 L. R. A., 560, which was decided by the Supreme Court of Rhode Island, the court declared:

"It is now *well settled* by general practice and concurrent authority, that a jury may be discharged when it is unable to agree upon a verdict. * * * It follows, therefore, that the existence of such facts as will warrant a discharge of the jury *must rest in the discretion of the trial judge.*"

South Carolina.

In *State* v. *McKee,* 1 Bailey, 651, the court said:

"We are enabled to say that a jury, after they are charged, can be discharged, and the prisoner tried a second time for the following causes only: 1. The consent of the prisoner. 2. Illness of one of the jury, prisoner, or the court. 3. Absence of one of the jurymen. 4. *The impossibility of agreeing on a verdict.*"

Texas.

In *Moseley* v.*The State,* 33 Texas, 671, the following state of facts was disclosed by the record: Appellant, Moseley, was on trial for murder. On the first trial the jury disagreed and were discharged by the court because

they were unable to agree, without the coinsent of the prisoner. Upon the second trial he pleaded former jeopardy, and in passing upon the question the court said:

"We are of opinion that the best interests of society may be more fully maintained and subserved by permitting the courts to exercise a sound and careful discretion in holding or discharging a jury, whenever a necessity should arise or the public good require."

The Texas statute in force at the time authorized the court, in its discretion, to discharge the jury after they had been kept together a sufficient length of time as to render it altogether improbable that they can agree. The prisoner's counsel contended that the statute was unconstitutional in that it deprived him of his constitutional right of not being placed in jeopardy a second time, but the court declared the statute constitutional and affirmed the decision of the lower court.

It thus appears from the authorities just cited, that in eleven of the states of this country, the Supreme Courts thereof have determined that the inability of a jury to agree is a "necessity" which warrants the discharge of the jury. In these eleven states the prisoner cannot successfully plead a discharge, made for such reasons, in bar upon a second trial. The Supreme Courts of other states in the Union have held in line with these authorities, but some of them have provisions in their constitutions authorizing the discharge of the jury, after a reasonable length of time for deliberation, because of their inability to agree, and are not authorities on either sides of the question.

The contrary doctrine prevails in Pennsylvania, Tennessee and Virginia, and probably one or two other states.

But the case at bar presents a very much weaker state

of facts for plaintiff in error than most of the cases above cited.

The only facts here upon which to base the inquiry is (1) a record declaring the "jury being unable to agree" were discharged; and (2) that the jury were out about seventeen hours.

Regardless of any mention as to the time they were out, it not appearing of record, (as in most of the cases above cited,) that the defendant objected, it must be presumed that he consented to the discharge of the jury, and for that reason, if no other, is not entitled to complain.

III.

The Indeterminate Sentence Act of the State of Illinois Is Not Unconstitutional.

In his discussion of this question counsel for plaintiff in error first calls attention to the form of the verdict, which is:

"We, the jury, find the defendant, Edward S. Dreyer, guilty of failure to pay over money to his successor in office, in manner and form as charged in the indictment, and we fix the amount thereof to be $316,000; and we fix his punishment at imprisonment in the penitentiary."

and also the judgment of the court committing the defendant upon the verdict, by which—

"It is ordered and adjudged by the court that the said defendant, Eward S. Dreyer, be, an he hereby is, sentenced to the penitentiary of this State, at Joliet, for the crime of failure to pay over money to his successor in office, whereof he stands convicted; and it is further ordrered and adjudged that the said defendant, Edward S. Dreyer, be taken from the bar of the court * * * and be delivered to the warden or keeper of the said peniten-

tiary; and the said warden or keeper is hereby required and commanded to take the body of the said defendant, Edward S. Dreyer, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof until discharged by the said board of pardons, as authorized and directed by law, provided said term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced."

It is asserted that there is no crime defined in the Criminal Code of Illinois by the term "failure to pay over to his successor in office," but that the section of the statute under which the defendant was indicted, tried and convicted is entitled "withholding funds." It will be observed that these terms found in the verdict and the sentence of the court are in the exact language of the statute defining the offense.

Counsel also calls attention to the fact that the judgment does not find the amount which the defendant has withheld, and hence under the statute the plaintiff in error could not be committed to the penitentiary at all "unless the money not paid over shall amount to $100." And counsel then asks, "Who is to determine what is the maximum term for the crime of which said defendant was convicted and sentenced?"

The jury having found in the verdict that the amount of money which plaintiff in error was found guilty of failure to pay over was $316,000, under the statute upon which he was indicted his punishment where the sum is over $100 must necessarily be in the penitentiary, as was properly fixed in the verdict and to which he was properly sentenced by the court. No question therefore arises as to the legality of the sentence, either by reason of the form of verdict or the place of punishment designated in

the judgment of the court, nor can any question in relation to these matters be raised in this court.

The principal contention made is that the act under which the sentence was imposed, and which provides that:

"The court imposing said sentence shall not fix the limit or duration of the same, but the term of said imprisonment shall not be less than one year, nor shall it exceed the maximum term provided by law for the crime for which the prisoner was convicted, making allowance for good time, as now provided by law,"

and which provides for the parole of prisoners under rules and regulations established by the board of pardons, and for the discharging of prisoners by the board of pardons, when approved by the Governor, is unconstitutional. The contention is based mainly upon the claim that the act is a delegation of judicial power to the pardoning board "and endows it with the power to inflict punishment unequally on violators of the law."

No argument is advanced to sustain this position, further than to quote the decision of *People* v. *Cummings,* 88 Mich., 249, in which a similar law was held to be unconstitutional, and an unreported decision of a *nisi prius* court in Illinois rendered before a contrary ruling of the highest tribunal of that State.

The law in question is a revision of an earlier statute, differing from it in no material respect, so far as the consideration of the question here involved is concerned, which was declared to be constitutional in the case of *George* v. *People,* 167 Ill., 447. A like conclusion was reached in the case of *People ex rel. Bradley* v. *Illinois State Reformatory,* 148 Ill., 413, involving the construction and validity of a similar law. The same conclusion

has also been reached in considering the constitutionality of similar statutes in Massachusetts, Indiana and Ohio.

Conlon's case, 148 Mass., 168.
Com. v. *Brown*, 167 Mass., 144, 146.
Oliver v. *Oliver*, 169 Mass., 592.
Com. v. *Crowley*, 128 Mass., 121.
Murphy v. *Com.* (Mass.), 43 L. R. A., 154.
Miller v. *State* (Ind.), 40 L. R. A., 109.
State v. *Peters*, 43 Ohio St., 629.

In the above decisions the question here raised as to the delegation of judicial power, and likewise various other objections to these laws relating to their indeterminate features, the uncertainty of the duration of sentence, the character and extent of punishment, the interference with the pardoning power, and every possible constitutional objection were considered, and the laws were upheld.

We cannot add to the reasoning in support of the constitutionality of these laws as set forth in the above decisions. In the *George case*, *supra*, the objections here raised were fully discussed, and it would serve no purpose to cite at length from this or the other decisions. It is enough to say that the *Michigan case*, relied upon by plaintiff in error, stands alone in support of his proposition against the constitutionality of these most salutary laws so wisely calculated to mitigate punishment and reform criminals. In the other states it is expressly held that the provisions of the acts complained of call for ministerial and not judicial acts; that the pardoning power as lodged by the constitution is undisturbed; that the right to trial by jury is unimpaired; that the Legislature may empower penitentiary officials to make rules and regulations for the government and discipline of prisoners, even to the extent

of empowering them to provide for the temporary release of prisoners on parole; that the character and extent of the punishmnt are clearly within the exclusive control of the Legislature; that there is in fact no uncertainty in the sentence under such laws, it in effect being for the maximum term, subject to either absolute or conditional pardon by the pardoning power, after the expiration of the minimum term fixed by the law; that it is the prerogative of the Legislature to fix all punishments for crime, limited by the rule that they must not be cruel or unusual; and that no constitutional right of a prisoner is infringed under such laws.

As stated by one of the judges: "To declare this act unconstitutional would result in the abrogation of our most salutary laws, holding out wise inducements for the reformation of criminals."

Conclusion.

We therefore respectfully submit (1) the "indeterminate sentence" law is valid. (2) The defendant was not placed in jeopardy from the fact that the jury in the first trial were discharged for their inability to agree; and in the absence of anything in the record to the contrary it must be presumed that the defendant consented thereto. (3) It appearing from the record of his last trial that the jury retired in charge of *sworn* officers it must be taken as a fact that they were duly and properly sworn, and the defendant not having objected to the oath administered, and having stood by cognizant of all the proceedings, cannot now be heard to complain, nor can he impeach the

record of this fact by affidavits. (4) Neither of the last two questions are properly raised by the record.

Respectfully submitted.

H. J. HAMLIN,
Attorney General.

C. S. DENEEN,
State's Attorney Cook County.

A. C. BARNES,
Assistant State's Attorney.
Of Counsel.